

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

KOMBA M. KPAKIWA and)	
CAROLEE KPAKIWA,)	
)	
Appellants,)	
)	
v.)	C.A. No. S10A-03-002 RFS
)	
BRAZOS STUDENT FINANCE)	
CORPORATION,)	
)	
Appellee.)	

MEMORANDUM OPINION

*Upon an Appeal from a Decision of the Court of Common Pleas.
Reversed and Remanded.*

Submitted: June 4, 2010

Decided: July 1, 2010

Maggie R. Clausell, Esquire, Dover, Delaware, Attorney for Appellants.

Patrick Scanlon, Esquire, Milford, Delaware, Attorney for Appellee.

STOKES, Judge

This is a debt action in which the Court of Common Pleas (“Common Pleas”) granted a motion for summary judgment filed by Appellee Brazos Student Finance Corporation (“Brazos”). Appellants Komba M. Kpakiwa and Carolee Kpakiwa (“Appellants”) appeal the Common Pleas decision. For the reasons explained below, the decision is affirmed in part and reversed in part, and the case is remanded to Common Pleas for trial.

Facts

On July 27, 1998, Appellants co-signed a loan agreement for \$9,000.00 for their son, Aiahya Matthew Kpakiwa (“Matthew”) to attend Lebanon Valley College in Annville, Pennsylvania. At that time, Appellants were residents of Pennsylvania. The original creditor was PNC Bank, who sold the loan to Brazos. The loan was a private loan, not subsidized by the Department of Education or any other federal agency. It is undisputed that Appellants executed the loan agreement, which is in default. Appellants made no payments on the loan. At some point, Matthew transferred from Lebanon Valley College to Harrisburg Area Community College (“HACC”). On June 19, 2008, Brazos filed a Complaint for debt and breach of contract.

A Common Pleas Commissioner heard oral argument, accepted briefs, and recommended that the Motion for Summary Judgment be granted. Appellants filed an appeal to Common Pleas, which accepted the Commissioner’s findings. Appellants filed a timely appeal to this Court.

Standard of Review

This Court reviews the factual findings and legal conclusions of the Court of Common Pleas in the same manner as the Supreme Court would consider an appeal.¹ That is, the function of this Court is to correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.² Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion.³ Errors of law are reviewed *de novo*.⁴

Issues

Appellants argue that there is a material fact in dispute with regard to the expiration of the statute of limitations. Appellants also argue that Common Pleas erred in refusing to dismiss Carolee Kpakiwa because Brazos' affidavit does not name her as being liable under the loan agreement.

Discussion

The governing statute of limitations provides as follows:

When a cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting

¹*Snyder v. Jehovah's Witness, Inc.*, 2005 WL 2840285 (Del. Super.).

²*State v. Harris*, 1993 WL 661695 (Del. Super.).

³*Olney v. Cooch*, 425 A.2d 610 (Del. 1981).

⁴*Downs v. State*, 570 A.2d 1142 (Del. 1990).

demand, the action may be commenced at any time within 6 years from the accruing of such cause of action.⁵

The parties dispute when the six-year limitations period was triggered. The loan agreement includes two phases, the deferred payment phase and the repayment phase. The first payment on the loan is due 30 days after the deferred payment phase. The deferred payment phase is six months after the earliest of: (1) five years from the date of the first disbursement of the first loan; (2) the date the student borrower graduates from the course of study for which the loan is made; or (3) the date the student borrower is no longer attending school at least on a part time enrollment status. The parties agree that the last of these dates is the applicable date, that is, the date Matthew was no longer attending school on a part-time basis and making progress towards a degree.

Appellants argue that Matthew left Lebanon Valley College on May 11, 2000. The first payment was due six months and 30 days after he left school, or December 11, 2000. If this scenario is accurate, the statute of limitations expired on December 11, 2006, and the Complaint was untimely filed on June 19, 2008. Brazos argues that Matthew transferred from Lebanon Valley College to Harrisburg Area Community College (HACC) and that he was enrolled there until the end of the semester ending December 15, 2001. If Matthew's transferral from Lebanon Valley College did not end his participation in the loan program, the first payment on the loan was due six months and 30 days after he was no longer enrolled at HACC, or July 15, 2002. The statute of limitations thereby

⁵Title 10 *Del. C.* § 8109 (1999).

expired on July 15, 2008, and the Complaint was timely filed on June 19, 2008.

In support of its position, Brazos submitted an affidavit prepared by its records custodian, Tom Pardaen, and a document from the National Student Clearing House (NSCH), purporting to show that Matthew was a full-time student at HACC for the semester ending December 15, 2001. Appellants argue that Pardaen's affidavit is hearsay because he did not prepare the NSCH document, which itself states that the "enrollment data is based on the information provided by the school." Thus, under Appellants' argument, Pardaen's affidavit and supporting documentation constitute three layers of hearsay – Pardaen's input, the NSCH representations, and information provided to NSCH by HACC. While it appears feasible to satisfy each layer of hearsay under the business records exception to the hearsay rule, this procedure was not followed at the summary judgment hearing.

However, before the question of hearsay can be considered, another issue must be addressed. The argument that Matthew was appropriately enrolled at HACC is based on the assertion that Matthew did not lose his active status in the loan program when he transferred from Lebanon Valley College (the school identified in the loan agreement papers) to HACC. This position is based on two assertions made by Appellants – first, that Matthew's leaving Lebanon Valley College triggered the deferment period and the statute of limitations and, second, that Lebanon Valley College not HACC was the only accredited school within the meaning of the loan agreement.

The threshold question for the trial court to determine on remand is whether the language of the loan agreement is plain on its face as to these questions or whether it is ambiguous. That determination is made without looking at extrinsic evidence.⁶

If the loan agreement is found to be ambiguous, then the trial court must accept extrinsic evidence to determine the intention of the parties in drafting the agreement. The objective extrinsic evidence may include statements and conduct of the parties, business circumstances surrounding the execution of the contract, any course of dealing between the parties, and any usage of trade or industry custom.⁷ The true test of intent is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.⁸

Assuming but not deciding that the loan agreement is ambiguous as to the effect of a student's transfer from one school to another, the trial court's analysis may unearth more than one question of material fact. Such questions include but are not limited to the effect of Matthew's transfer to HACC and the dates of Matthew's enrollment at HACC. In response to Pardaen's affidavit, Matthew submitted an affidavit asserting that he spent

⁶*O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 289 (Del. 2001)(noting that the duty of courts is to examine solely the language of contractual provisions in question in order to determine whether the terms are capable of two or more reasonable interpretations, by confining examination to the language of the document and not looking to extrinsic evidence to find ambiguity).

⁷*Delaware Express Shuttle, Inc. v. Older.*, 2002 WL 31458243, at *6 (Del. Ch.)(citing *In re Explorer Pipeline Co.*, 781 A.2d 705, 714 (Del. Ch. 2001)).

⁸*Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

the fall semester of 2001 playing soccer in England and did not attend any classes at HACC that semester.

If these questions are found to be necessary to the resolution of the matter, the trial court may also have to address more fully the issue of hearsay within hearsay.⁹

Appellants argue that Tom Pardaen's affidavit and the NSCH document are both hearsay. In addition, a third layer of hearsay exists in the information provided to NSCH by HACC itself. HACC provided information to NSCH that Matthew was a full-time student through 12/15/2001. This is offered for the truth of the matter and is hearsay.¹⁰ The statement from HACC was passed through NSCH to Brazos. In order to be admissible the notation must satisfy the business records exception in D.R.E. 803(6).¹¹ Where multiple layers of hearsay exist, each must satisfy hearsay rules before substantive effect can be given. Where the source and reporter of the information shares business duties to record information accurately in the regular course of business, then the information can

⁹D.R.E. 805 provides as follows:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

¹⁰*See, e.g., United States v. Duncan*, 919 F.2d 981 n. 4 (5th Cir. 1991)(quoting an exchange between lawyer and witness for the purpose of authenticating documents under the business records exception).

¹¹*Brown v. Liberty Mutual Ins. Co.*, 774 A.2d 232, 238-39 (Del. 2001) (an out-of-court record of an act or event is admissible under the business records exception (1) if the record was made at or near the time of the act or event (2) by, or from information transmitted by, a person with knowledge, (3) if the record is prepared and maintained in the course of a regularly conducted business activity and (4) if it was the regular practice of the organization to make a record of the act or event. Even if the statement satisfies these requirements, the trial court may exclude the statement where the method of preparation of the record or the source of the information indicates a lack of trustworthiness).

be admitted assuming the parts of D.R.E. 803(6) are satisfied.

Information provided by outsiders that is recorded in business records may satisfy the business records exception. Importantly, “[i]f the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider’s statement must fall within another hearsay exception. . . . However, if the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person, the business record exception applies. Since the trustworthiness of the evidence is the justification of the business record exception, the verification must provide a strong assurance of accuracy.”¹²

Here, Brazos’ incorporation and reliance upon the NSCH document in its business may be a basis of reliability of NSCH-generated information. However, HACC provided the statement that Matthew was a full-time student through 12/15/2001. No evidence was provided about verification measures routinely taken by NSCH in the compiling of school enrollment data. Without assurances of this nature, a substantial concern exists about the reliability of this potentially critical information.

Appellant argued in the brief that Pardaen’s affidavit did not satisfy the multiple layers of hearsay. Appellee did not refute the argument but relied upon Matthew’s affidavit that he withdrew from one class early in the semester at HACC to play soccer in England. The affidavit, while an admission that Matthew transferred to HACC, is not an

¹²*Russo v. Abington Memorial Hospital Healthcare Plan*, 1998 WL 967568, at *2 (E.D. Pa.)(citing *U.S. v. Sokolow*, 91 F.3d 396, 403 (3rd Cir. 1996))(other internal citations omitted).

admission that he was a part-time or full-time student through December 15, 2001.

Summary judgment is not appropriate where there are material questions of fact in dispute or where it is desirable to inquire more thoroughly into the facts to clarify the application of the law.¹³ Nor is it to be granted where the supporting affidavit contains or might contain hearsay.¹⁴ In this case, there are questions of law at issue regarding the loan agreement, which may in turn, give rise to questions of material fact as to Matthew's enrollment and status as a student. The Pardaen affidavit contains hearsay, as outlined above. All of these questions pertain to the statute of limitations and whether the Complaint was timely filed. None of these questions have been answered. The trial court's granting of summary judgment on the issue of the statute of limitations is reversed, and the cause is remanded to Common Pleas for proceedings consistent with this Opinion.

Liability of Appellant Carolee Kpakiwa. Appellants argue that because Pardaen's affidavit did not aver that Carolee Kpakiwa was indebted to Brazos, the Commissioner erred when he denied Appellants' motion to dismiss the claim against her. Appellants argue that the alleged mistake of not naming Carolee Kpakiwa's in the Affidavit raises a material issue of fact as to her liability. However, the record shows that

¹³*Grasso v. First USA Bank*, 713 A.2d 304, 307 (Del. Super. Ct. 1998).

¹⁴*Continental Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743 (Del. 1965); *Wilson v. Pala Mgmt. Corp.*, 1988 WL 55310 (Del. Super.). See also CCP Civ. R. 56(e), which provides in part as follows: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Identical provisions are found in Super. Ct Civ. R. 56(e).

she is a named party on the Complaint as required by CCP Civ. R. 10(a). She is also named on the Affidavit; she signed the loan agreement; and her sole defense is that the Complaint was not timely filed. The Commissioner's denial of the motion to dismiss Carolee Kpakiwa is affirmed.

Conclusion

The Court concludes that the trial court erred in granting Appellants' motion for summary judgment on the issue of the statute of limitations. The trial court did not err in accepting the Commissioner's denial of Carolee Kpakiwa's motion to dismiss. The decision is therefore **REVERSED IN PART** and **AFFIRMED IN PART**.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary